

**Iowa Department of Natural Resources
Environmental Protection Commission**

ITEM

7

DECISION

TOPIC

**Notice of Intended Action, Chapter 61, Water Quality Standards, Section
401 Certification of Section 404 Regional Permit 7 (RP 7)**

The Commission is asked to approve the attached Notice of Intended Action to amend Chapter 61, “Water Quality Standards,” Iowa Administrative Code. The proposed amendment will provide water quality certification pursuant to Section 401 of the federal Clean Water Act (33 U.S.C. Section 1341) for the re-issued Regional Permit 7 (RP 7). Section 401 water quality certification is a state water quality agency’s certification that a proposed activity will not violate state water quality standards.

Regional Permit 7 (RP 7) authorizes fill material placed in waters of the United States for bridge or road crossings. RP 7 was initially issued in 1979 and has been re-issued in 1985, 1989, 1995, 1999, and 2002. This permit is used for Iowa Department of Transportation (IDOT) and Iowa County and City Engineers’ bridge or road crossing projects. Since this permit has been granted Section 401 Water Quality Certification in the past, the only change to Chapter 61 will be the effective date of the rule change.

The Corps issued the public notice for the re-issuance of RP 7 with some modifications on February 4, 2008 and it expired on March 4, 2008. A copy of the February 4, 2008 Public Notice can be obtained from the Department of Natural Resources (DNR). The Corps received no comments from the Environmental Protection Agency, the U.S. Fish and Wildlife Service, or from the public. Several Indian Tribes provided comments stating they had no objections to the re-issuance of this RP, but requested that the Corps condition the RP so that construction authorized under this RP immediately stop if any items falling under the Native American Graves Protection and Repatriation Act are discovered. At that time, the Tribes will be notified for further consultation.

RP 7 was revised to be not only easier to understand but also contain more of the standard conditions that would be found in an individual permit for a bridge or road crossing project (e.g., the type of material that can be used as a temporary crossing, that wetland mitigation must be provided for any project impacting more than 0.10 acre of wetland, etc.) The revised RP 7 will allow the placement of 1,000 cubic yards of material to be “placed below the plane of ordinary high water or in wetland areas”. The former RP 7 only allowed 500 cubic yards.

The IDOT had the opportunity to review and comment on the draft RP 7 prior to the Corps issuing the public notice with the final version of RP 7.

Charles Corell, Bureau Chief
Water Quality Bureau
July 8, 2008

Amend paragraph 61.2(2) “h” as follows:

h. This policy shall be applied in conjunction with water quality certification review pursuant to Section 401 of the Act. In the event that activities are specifically exempted from flood plain development permits or any other permits issued by this department in 567–Chapters 70, 71, and 72, the activity will be consistent with this policy. Other activities not otherwise exempted will be subject to 567–Chapters 70, 71, and 72 and this policy. The repair and maintenance of a drainage district ditch as defined in 567–70.2(455B,481A) will not be considered a violation of the antidegradation policy for the purpose of implementing Title IV of these rules. United States Army Corps of Engineers (Corps) nationwide permits 3, 4, 5, 6, 7, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, and 50 as well as Corps regional permits 7, 33, and 34 as promulgated October 29, 2008 ~~March 19, 2007~~, are certified pursuant to Section 401 of the Clean Water Act subject to the following Corps regional conditions and the state water quality conditions:

(1) Side slopes of a newly constructed channel will be no steeper than 2:1 and planted to permanent, perennial, native vegetation if not armored.

(2) Nationwide permits with mitigation may require recording of the nationwide permit and pertinent drawings with the registrar of deeds or other appropriate official charged with the responsibility for maintaining records of title to, or interest in, real property and may also require the permittee provide proof of that recording to the Corps.

(3) Mitigation shall be scheduled for construction prior to, or concurrent with, the discharge of dredged or fill material into waters of the United States.

(4) For discharges of dredged or fill material resulting in the permanent loss of more than 1/10 acre of waters of the United States (including jurisdictional wetlands), a compensatory mitigation plan to offset those losses will be required. In addition, a preconstruction notice to the Corps of Engineers in accordance with general condition 27 will be required.

(5) For newly constructed channels through areas that are unvegetated, native grass filter strips, or a riparian buffer with native trees or shrubs a minimum of 35 feet wide from the top of bank must be planted along both sides of the new channel. A survival rate of 80 percent of desirable species shall be achieved within three years of establishment of the buffer strip.

(6) For single-family residences authorized under nationwide permit 29, the permanent loss of waters of the United States (including jurisdictional wetlands) must not exceed ¼ acre.

(7) For nationwide permit 46, the discharge of dredged or fill material into ditches that would sever the jurisdiction of an upstream water of the United States from a downstream water of the United States is not allowed.

(8) For projects that impact fens, bogs, seeps, or sedge meadows, an individual Section 401 Water Quality Certification will be required (Iowa Section 401 Water Quality Certification condition).

(9) For nationwide permits when the Corps’ district engineer has issued a waiver to allow the permittee to exceed the limits of the nationwide permit, an individual Section 401 Water Quality Certification will be required (Iowa 401 Water Quality Certification condition). Written verification by the Corps or 401 certification by the state is required for activities covered by these permits as required by the nationwide permit or the Corps, and the activities are allowed subject to the terms and conditions of the nationwide and regional permits. The department will maintain and periodically update a guidance document listing the special waters of concern. This document will be provided to the Corps for use in determining whether preconstruction notices should be provided to the department and other interested parties prior to taking action on applications for projects that would normally be covered by a nationwide or regional permit and not require preconstruction notice under nationwide permit conditions.

ENVIRONMENTAL PROTECTION COMMISSION [567]

Notice of Intended Action

Pursuant to the authority of Iowa Code sections 455B.105 and 455B.173, the Environmental Protection Commission hereby gives Notice of Intended Action to amend Chapter 61, “Water Quality Standards,” Iowa Administrative Code. The proposed amendment will provide water quality certification pursuant to Section 401 of the federal Clean Water Act (33 U.S.C. Section 1341) for the re-issued Regional Permit 7 (RP 7).

Section 404 of the Clean Water Act requires a permit from the Corps of Engineers (Corps) for the discharge of dredged or fill materials into the nation’s waters. Section 401 of the Act requires that before the Corps can issue a Section 404 permit, the state water quality agency must certify that the proposed activity will not violate state water quality standards.

Section 404 authorizes the Corps to issue general permits on a state, regional or nationwide basis for categories of activities where such activities will have minimal adverse effects. The Corps has used their general permit authority to issue a number of general permits on a nationwide basis. General permits, including regional permits, can be issued for a period not exceeding five years and a state water quality agency must provide Section 401 certification for a Section 404 general permit before the general permit is valid for that particular state. The Commission previously provided Section 401 certification for RP 7. These permits are referenced in 567- Chapter 61.2(2)“h”.

The Corps issued the public notice for the re-issuance of RP 7 on February 4, 2008 and it expired on March 4, 2008. A copy of the February 4, 2008 Public Notice can be obtained from the Department of Natural Resources (DNR). This amendment would provide Section 401 certification for the modified RP 7.

Any interested person may file written comments on the proposed amendment on or before August 19, 2008. Written comments or questions regarding the proposed action should be directed to

Christine Schwake, Department of Natural Resources, 502 East 9th Street, Des Moines, IA 50319-0034 (phone 515-281-6615 / fax 515-281-8895 / e-mail christine.schwake@dnr.iowa.gov). Oral or written comments will also be accepted at a public hearing to be held on August 19, 2008 at 1:00 PM in the 5th floor East conference room of the Wallace State Office Building, E 9th Street and Grand Avenue, Des Moines, Iowa.

The Commission will not take final action on this proposed amendment prior to the public hearing on August 19, 2008 and will consider all comments received during the public comment period before taking final action.

This amendment may have an impact on small businesses.

This amendment is intended to implement Iowa Code Chapter 455B, division III, part 1.

Amend paragraph 61.2(2) “h” as follows:

h. This policy shall be applied in conjunction with water quality certification review pursuant to Section 401 of the Act. In the event that activities are specifically exempted from flood plain development permits or any other permits issued by this department in 567–Chapters 70, 71, and 72, the activity will be consistent with this policy. Other activities not otherwise exempted will be subject to 567–Chapters 70, 71, and 72 and this policy. The repair and maintenance of a drainage district ditch as defined in 567–70.2(455B,481A) will not be considered a violation of the antidegradation policy for the purpose of implementing Title IV of these rules. United States Army Corps of Engineers (Corps) nationwide permits 3, 4, 5, 6, 7, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, and 50 as well as Corps regional permits 7, 33, and 34 as promulgated October 29, 2008

~~March 19, 2007~~, are certified pursuant to Section 401 of the Clean Water Act subject to the following Corps regional conditions and the state water quality conditions:

(1) Side slopes of a newly constructed channel will be no steeper than 2:1 and planted to permanent, perennial, native vegetation if not armored.

(2) Nationwide permits with mitigation may require recording of the nationwide permit and pertinent drawings with the registrar of deeds or other appropriate official charged with the responsibility for maintaining records of title to, or interest in, real property and may also require the permittee provide proof of that recording to the Corps.

(3) Mitigation shall be scheduled for construction prior to, or concurrent with, the discharge of dredged or fill material into waters of the United States.

(4) For discharges of dredged or fill material resulting in the permanent loss of more than 1/10 acre of waters of the United States (including jurisdictional wetlands), a compensatory mitigation plan to offset those losses will be required. In addition, a preconstruction notice to the Corps of Engineers in accordance with general condition 27 will be required.

(5) For newly constructed channels through areas that are unvegetated, native grass filter strips, or a riparian buffer with native trees or shrubs a minimum of 35 feet wide from the top of bank must be planted along both sides of the new channel. A survival rate of 80 percent of desirable species shall be achieved within three years of establishment of the buffer strip.

(6) For single-family residences authorized under nationwide permit 29, the permanent loss of waters of the United States (including jurisdictional wetlands) must not exceed ¼ acre.

(7) For nationwide permit 46, the discharge of dredged or fill material into ditches that would sever the jurisdiction of an upstream water of the United States from a downstream water of the United States is not allowed.

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Date

Richard A. Leopold, Director

Administrative Rule Fiscal Impact Statement

Date: 6/12/2008

Agency: Department of Natural Resources 567

IAC Citation: IAC 567 Chapter 61

Agency Contact: Christine Schwake

Summary of the Rule: This rule revises IAC 567 Chapter 61 to the proposed re-issuance of U.S. Army Corps of Engineers Regional Permit 7. The U.S. Army Corps of Engineers (Corps) re-issues their Regional Permits (RPs) every 5 years. This RP is listed in Chapter 61.

Fill in this box if the impact meets these criteria:

☒ No Fiscal Impact to the State.

☐ Fiscal Impact of less than \$100,000 annually or \$500,000 over 5 years.

☐ Fiscal Impact cannot be determined.

Brief Explanation: The costs to the Corps and to the IDNR will decrease because the two agencies won't have to issue public notices for each project covered by the RP. The regulated public's costs will also decrease because no fee is charged (by the Corps) to the permittee for RPs, whereas projects authorized under Individual Permits are charged (by the Corps) \$10 for private development and \$100 for commercial development. The IDNR does not charge a fee for Section 401 Water Quality Certificates.

Fill in the form below if the impact does not fit the criteria above:

☐ Fiscal Impact of \$100,000 annually or \$500,000 over 5 years.

* Fill in the rest of the Fiscal Impact Statement form.

Assumptions:

Describe how estimates were derived:

Estimated Impact to the State by Fiscal Year

	<u>Year 1 (FY)</u>	<u>Year 2 (FY)</u>
Revenue by Each Source:		
GENERAL FUND		
FEDERAL FUNDS		
Other (specify)		
TOTAL REVENUE	_____	_____
Expenditures:		
GENERAL FUND		
FEDERAL FUNDS		
Other (specify)		
	_____	_____

TOTAL EXPENDITURES

NET IMPACT

☒ This rule is required by State law or Federal mandate.

Please identify the state or federal law:

Rules implement Iowa Code sections 455B.105 and 455B.173 and 33 CFR Part 330 (Sections 404 & 401 of the Clean Water Act)

☐ Funding has been provided for the rule change.

Please identify the amount provided and the funding source:

☒ Funding has not been provided for the rule.

Please explain how the agency will pay for the rule change:

No funding is provided or necessary because these rules will not have a fiscal impact on the agency.

Fiscal impact to persons affected by the rule:

There is no fiscal impact associated with this rule change. Projects covered by regional permits are not charged a fee and receive their permit within a couple of weeks of application submittal. If a RP is denied, an individual permit would be necessary for the project. The Corps charges \$100 for individual permit issued for commercial businesses with all other individual permits being charged \$10. Individual permits also take an average of 2-4 months to process.

Fiscal impact to Counties or other Local Governments (required by Iowa Code 25B.6):

There is no fiscal impact to counties or other local governments for the same reasons stated in the previous section.

* If additional explanation is needed, please attach extra pages.

Agency Representative preparing estimate: Christine Schwake
Telephone Number: 515-281-6615

Form A

NOTICE OF INTENDED ACTION
(Proposed Rule)

A

Do not write in this space

ARC # _____

Style Approved: _____

Content Approved: _____

Agency & IAC Number: _____ Natural Resources [567]

IAC Chapter & Title Added or Amended: Chapter 61.2(2)h

Water Quality Standards

Statutory Designee With
Rule-making Authority: _____ Environmental Protection Commission

Contact
Person: _____ Christine Schwake

Phone: _____ 281-6615

Date Approved by Designee: _____ July 8, 2008

Publication Date: _____ July 30, 2008

Date of Public Hearing (if any): _____ August 19, 2008

Deadline for Written Comment: _____ August 19, 2008

Summary of Rule/Rule Changes: The U.S. Army Corps of Engineers (Corps) re-issues their Regional Permits (RPs) every 5 years. RP 7, authorizing work associated with bridges and road crossings, will expire on 12/31/2008 and is proposed for re-issuance. This RP is listed in Chapter 61.

Reason for the Rule/Rule Changes: This RP is meant to help with Iowa's water quality and reduce the amount of sediment and contaminants reaching the Mississippi and Missouri Rivers and eventually the Gulf of Mexico. The RPs are a way for the Corps to expedite the review of projects that have little environmental impact.

Effect of Rule Adoption/Change: (who, what, when, etc.) The re-issued RP was re-written to be easier for the general public to understand. The Regional Permits are for activities that, in the past, required individual permits from the Corps along with individual Section 401 Water Quality Certifications from the Iowa Department of Natural Resources (IDNR). There were 58 projects authorized under this regional permit during the period August 2004 and December 2007. Some of these were projects that would have been authorized under nationwide permit 14 had the nationwide permits not expired in March 2007. The Corps had RP 7 out on public notice from February 4, 2008 through March 4, 2008. They received no comments from the Environmental Protection Agency, the U.S. Fish and Wildlife Service, or from the public. Several Indian Tribes had no objections to the re-issuance of this RP, but requested that the Corps condition the RP so that construction authorized under this RP immediately stop if any items falling under the Native American Graves Protection and Repatriation Act are discovered. At that time, the Tribes will be notified for further consultation. The IDNR and the Corps save money, otherwise spent on public notices, if projects can be authorized under a regional permit versus an individual permit.

Is this change mandated by State or Federal Law? Yes, rule is mandated by 33 CFR Part 330.

Will anyone be affected by this rule change? If yes, who will be affected and will it be to the person's benefit or detriment? This Regional Permit will benefit the Iowa Department of Transportation (IDOT) and individual counties and cities that construct bridges and roadway crossings. The RP will be reviewed by environmental groups (e.g., Iowa Environmental Council, Sierra Club, Audubon Society) who are interested in ensuring adequate protection of Iowa's water quality.

What are the potential benefits of this rule? This regional permit was re-written to easier to understand the requirements/conditions of the RP which will allow the applicants (e.g., IDOT, counties, cities, etc.) to design their projects in such a way as to be covered by this permit (this should help the applicants maintain project schedules). The IDNR and the Corps save money, otherwise spent on public notices, if projects can be authorized under a regional permit versus an individual permit.

What are the potential costs, to the regulated community or the State of Iowa as a whole, of this rule? The costs to the Corps and to the IDNR will decrease because the two agencies won't have to issue public notices for each project covered by a RP. The regulated public's costs will also decrease because no fee is charged (by the Corps) to the permittee for RPs. Individual Permit holders are charged (by the Corps) \$10 for private development and \$100 for commercial development.

Do any other agencies regulate in this area? No
If so, what agencies and what Administrative Code Sections apply?

What alternatives to direct regulation in this area are available to the agency? None Why were other alternatives not used? The Clean Water Act requires a water quality certificate from the state for Section 404 permits.

Does this rule contain a waiver provision? No If not, why? This rule is based on the Corps of Engineers' regulations (33 CFR Part 330).

Likely areas of public comment: None

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